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Should Court-Sponsored ADR Survive?

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The plenary session of the 2005 National Conference on Court ADR¹ addressed two big questions: “Can Court ADR Survive and Should It?” As its title indicates, this essay addresses only the prescriptive question of whether court ADR programs “should” survive. I leave for others the question of whether such programs can survive, in part because the answer seems to hinge on developments in the budgetary and political arena—uncertainties far beyond my ken.

To focus the proceedings at the plenary session, the organizers of the conference asked the speakers to address several more specific questions, some of which I use to help organize part of my response to the broader question: Should court ADR programs survive? These questions included: (1) Does court ADR promote a two-tiered justice system? (2) What would happen if the courts dropped ADR programs? and (3) How do we manage competition between court ADR and the private sector?²

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¹ This court-focused set of sessions was held just before, and in conjunction with, the 2005 Annual Conference of the Dispute Resolution Section of the ABA in April, 2005 in Los Angeles, California.

² Before turning to the substance of our inquiries, it is important to emphasize that the answers to some of our questions will vary with the circumstances of individual courts or court systems. Local legal cultures vary, as do docket profiles, court resources, docket pressures, and the demography of the client and lawyer communities. The extent of the development of the private ADR provider market also can vary dramatically between jurisdictions—as can the level of experience and comfort with various ADR tools in the local bar and among local repeat-player clients. The answers to these questions also may vary with key characteristics of court programs. These characteristics may include, among others: whether participation in ADR is mandated by the court or is voluntary; whether the parties are permitted to select their own neutral; whether the parties are required to pay for the neutral’s services and, if so, whether at market rates or at below-market rates; and the kinds of cases that are served by the ADR program and the circumstances of the parties. For example, the answers to some of these questions might well be different for poor and legally unsophisticated civil rights litigants than for well-heeled and otherwise equally matched corporate foes.

One of the co-panelists for the plenary session was to be Bernard S. Mayer, author of the recently published book entitled *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*.³ While a last-minute emergency prevented him from appearing in person, his thoughtful and provocative book served as a stimulating source of perspectives and ideas that informed substantial portions of the panelists' consideration of the issues.

Two sections of this essay represent efforts to respond directly to concerns Mr. Mayer expressed about the current status of mediation and to significant challenges that he sees facing the field of ADR. In one of these sections, we consider whether proponents of court ADR have been guilty of promising much more than such programs can deliver—thus creating a credibility gap. In another section, we explore sets of incentives that could affect the character of mediation, or how mediators perform their roles, in three different contexts: in the private sector, in docket-oriented court programs, and in litigant-oriented court programs. Our goal, in making these comparisons, is to assess which context offers the most promise for moving mediators and parties beyond preoccupation with “getting a deal” and toward a fuller appreciation of what can be gained from the fact of engagement and the character of the mediation process.

I. THE CORE REASONS TO MAINTAIN COURT ADR PROGRAMS

I begin at the center. My answer to the question, should court ADR programs survive, is an emphatic yes.⁴

Why? A short set of core propositions informs this view. I start from the premise that to sustain the health of our democracy, it is essential that our

³ See generally BERNARD S. MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* (2004).

⁴ It is important to make clear, at the outset, the context that shapes my thoughts about this issue. In the ADR program that I have supervised for many years, the court offers the services of its neutrals—mediators, evaluators, and arbitrators—for free. For a wide range of information about the ADR program in the U.S. District Court for the Northern District of California see the program's website. United States District Court Northern District of California, Alternative Dispute Resolution Program, <http://www.adr.cand.uscourts.gov> (last visited Dec. 20, 2005). The parties are permitted to choose among four or five process options, one of which is to retain a neutral of their own choice from the private ADR provider community and to tailor a process that seems to best fit their specific situation. See N.D. CAL. ADR R. 3-4, 3-5 (2003). The neutrals that are provided by the court are selected and trained by the court. Before admission to the pool of court provided neutrals, they must meet a set of objective requirements and “pass” the training course. *Id.* at 2-5. They are volunteers, mostly seasoned lawyers, and are expected to serve without compensation in two or three cases a year.

public institutions be healthy—that they be truly useful to the people, that they be able to make the necessary adjustments in the way they operate to remain responsive to the people's needs, and that the procedures they follow and the orientation they project encourage the people's respect. I also believe that courts are, fundamentally, service institutions. I contend that courts fail in their fundamental mission if they provide real service to only a small percentage of cases or to only a small percentage of persons with judicially cognizable disputes. Further, I fear that the substantial cost of civil litigation has resulted, for many people, in a demoralizing disproportion between litigation transaction costs and the economic significance or value of their disputes. In large measure because of that disproportion, it is likely that many people feel that they cannot turn to the courts to try to protect their rights, or, in the case of defendants, cannot afford to use to defend themselves the tools that the civil litigation system, in theory, offers. For such people, the disproportion between cost and value has the effect of closing the courthouse doors, and making the judicial branch of our government a mirage. Moreover, this same disproportion forces many of those people who try to use the court system to leave it before the judiciary has provided them with any really useful service.

In these circumstances, one of the very few ways a court can be useful to a substantial segment of the population is to offer a free or low-cost ADR program. By offering such a program, a court acknowledges the real-world limitations, for many people, of the services it traditionally has offered. As important, the court demonstrates that it understands that its mission is to offer useable and respect-worthy service to as large a percentage of the people who have judicially cognizable disputes as possible. This kind of acknowledgment and demonstration earn a court the gratitude and respect of the people—and gratitude toward and respect for our public institutions is essential to the long-range health of our polity.

Some facts-of-litigation-life in federal courts⁵ will help explain why I fear that courts that do not provide free or low cost ADR services are not likely to provide any meaningful service to a substantial percentage of their cases—to say nothing of the people who were fiscally intimidated into never filing in the first place. The civil trial rate is less than two percent in federal

⁵ I cite statistics from the federal trial courts because I do not have access to comparable figures for state courts (in the aggregate). It is important to acknowledge, however, that state courts handle the vast majority of civil litigation in this country—and that while the two systems likely share many of the same problems (undoubtedly not in identical degrees), we cannot safely generalize from one to the other. A much greater variety of circumstances attend the work of state courts than federal courts, in part because there are so many state courts with specialized jurisdictions that have no parallel in the federal system.

courts.⁶ Less than eight percent of civil cases in federal courts are resolved by summary judgment.⁷ While federal courts grant motions to dismiss without leave to amend (as well as miscellaneous other kinds of dispositive motions) in an additional modest percentage of cases,⁸ it is unlikely that the exercise of adjudicative power in contested proceedings⁹ is the direct cause of disposition in more than about twenty percent of the civil cases that are filed in federal courts.

It also is significant that between twenty percent and thirty-five percent of civil cases leave the federal system without any action by or direct contact

⁶ See Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 706 (2004); Judicial Business of the United States Courts 2004, tbl. C-4A, <http://www.uscourts.gov/judbus2004/contents.html> (last visited Dec. 20, 2005) (indicating a total of 1.6%). This Annual Report of the Director of the Administrative Office of the United States Courts is also available in hardcopy from the Administrative Office at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

⁷ Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 591, 606 (2004).

⁸ The percentage of civil cases in federal courts that are terminated by contested motions that address the merits of claims is not known—and cannot be reliably inferred from data as it is regularly gathered by the Administrative Office of the United States Courts. While Professor Burbank's study, cited in the preceding footnote, gives us figures in which we can have some confidence for motions for summary judgment, no comparable work sheds clear light on final dispositions caused by rulings on other kinds of contested pretrial motions. Professor Gillian K. Hadfield's pioneering and important work certainly gives us a better feel for this part of the litigation world—in federal court—than we ever had before, but, as she emphasizes, her exposure to the considerable unreliability of some of the data reflected in the annual reports from the Administrative Office forces us to acknowledge that at this juncture the best we can do is estimate a range of percentages within which the actual figure likely falls. See Hadfield, *supra* note 6, at 705. See also THOMAS E. WILLGING, *USE OF RULE 12(b)(6) IN TWO FEDERAL DISTRICT COURTS* (1989). The two district courts Mr. Willging studied were the Eastern District of Pennsylvania and the District of Maryland. Mr. Willging found that motions to dismiss under Rule 12(b)(6) were filed in about 13% of the civil actions in his two court sample, but that these motions resulted in termination of the entire litigation in only about 3% of the cases. *Id.* at 8–9.

⁹ For purposes of the argument I make here, dispositions that result from rulings on uncontested pre-trial motions need to be treated separately. Losses, in litigation, by default or silence may be symptoms of the economic inaccessibility of the court system that I discuss in the text—but hardly qualify as a “service” rendered by the court to the losers. Of course, the court performs a service for the party in whose favor a judgment is entered—even if collectability remains quite uncertain.

with a judge.¹⁰ Nearly three quarters of the cases have left the federal court system before a judge holds a pretrial conference.¹¹ Thus, it seems that the only “service” that the vast majority of civil cases get from federal courts is a case management conference or two—perhaps supplemented in some cases by a ruling on a discovery dispute.

Statistics like these, statistics that are attributable at least in some measure to the high cost of formal adjudicatory processes,¹² support my belief that free or low cost ADR programs represent one of the very few means through which courts can provide any meaningful service to many litigants. In fact, I believe—for reasons I will describe in more detail later in this essay—that free or low-cost ADR programs hold more promise than any other procedure or service for making courts useful to the great body of judicially under-served disputants. Court ADR must survive if the judicial branch is to remain relevant to all but the few.

II. ARE COURT ADR PROGRAMS BURDENED BY A CREDIBILITY GAP?

In *Beyond Neutrality*, Bernard S. Mayer suggests that one of the ADR movement’s problems today is the gap between promises made about the benefits of ADR—in general and mediation in particular—and the benefits actually delivered by the relatively widespread use of ADR.¹³ While I cannot offer a comprehensive assessment of the nature and extent of any such gap, structuring this section of this essay around this idea provides a vehicle for exploring, in a compact way, some additional reasons to continue well-designed and attentively administered court ADR programs.¹⁴

¹⁰ Judicial Business of the United States Courts, *supra* note 6. The percentage of civil cases that leave the federal court system before having contact with a judge has declined over the past decade and a half, apparently as a result, at least in part, of the trend toward holding case management conferences early in the pretrial period.

¹¹ *Id.* The figure for the statistical year ending on September 30, 2004, was 69%. For the statistical year ending on September 30, 1999, the figure was 74%.

¹² In turn, the high cost of litigation is attributable, again at least in part, to the high fees charged by many lawyers. For example, the level of compensation received by first year associates in large firms in California increased by more than twice as much as the rate of inflation (as measured by the CPI) between 1975 and 2000. In 1975, the annual salary for a first year associate in the self-styled top-tier firms in San Francisco was \$16,500. By the year 2000, that figure had risen to about \$125,000. If compensation for first year associates had simply tracked the rate of inflation their first year salaries in 2000 would have been about \$58,000.

¹³ *E.g.*, MAYER, *supra* note 3, at 51–52, 58–59.

¹⁴ I have discussed some of these matters in earlier papers. See, *e.g.*, Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93, 95–97 (2002) [hereinafter *25 Years After Pound*]; Wayne D. Brazil,

A. *What Promises or Claims Have Been Made in Support of Court ADR Programs?*

Not all of the promises made in support of the mediation movement, as a whole, have been made for court programs in particular. But court interest in ADR probably has been influenced by a wide array of claims about the benefits that ADR processes might deliver. Some of the more ambitious claims that have been made for mediation outside the court-context have been used to support attacks on court programs—to suggest, sometimes obliquely, that those programs were conceived in naïveté and have floundered, badly, in reality.¹⁵

It also is important to emphasize that not all courts have made the same promises or entertained the same hopes for their ADR programs. Ambitious expectations have accompanied programs in some courts. In others, proponents have been more guarded. In the Northern District of California we limited our initial promise to one core notion: “While we cannot guarantee any particular set of results or effects, we promise to make a concerted and open-minded effort to determine whether something of net value to litigants can be delivered by incorporating into the broader judicial

A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values, 1990 U. CHI. LEGAL F. 303, 322–331 [hereinafter *A Close Look*].

¹⁵ See Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 135–40 (2004). See generally Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1 (1987) (comparing ADR and civil litigation from many perspectives, some captured under the concept of “quality of justice,” and challenging some of the claims made for ADR by its early proponents); Kim Dayton, *The Myth of Alternative Dispute Resolution in Federal Courts*, 76 IOWA L. REV. 889 (1991) (contending that court-connected ADR has not expedited dispositions or reduced backlogs and does not yield other claimed benefits); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992) (contending that mediation and mediators fail to protect women from abuses of power by men in divorce proceedings and that women’s rights are better protected through negotiations handled directly by lawyers); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?* 99 HARV. L. REV. 668 (1986) (challenging the suggestion that a private or loosely community-based ADR system should replace—in substantial measure—the system of civil adjudication); Mark R. Sherman, *Mediation Hype & Hyperbole: How Much Should We Believe?*, DISP. RESOL. J., Aug.–Oct. 2003, at 43 (re-examining six widespread beliefs about mediation); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297 (1996) (recognizing mixed research results and cautioning against idealization).

system some procedures from the emerging world of alternative dispute resolution.”¹⁶

The principal promises attributed to advocates of court ADR programs, and against which their success is most often measured, are well known and can be restated in short order. The most common promise was that, for both litigants and courts, ADR programs would reduce cost and delay in civil litigation.¹⁷ The new procedures would reduce the cost of securing settlements while increasing the settlement rate and reducing net time to disposition. These developments would inure to the benefit of all litigants and the courts. They would alleviate docket pressures and shorten the trial queue for those who really needed to go all the way through the adjudicatory system.

ADR procedures also were touted for their ability to get parties more directly involved¹⁸—to expand their knowledge of the evidence and law, to increase their participation in decision-making all along the litigation line,

¹⁶ See, e.g., Wayne D. Brazil, Michael A. Kahn, Jeffrey P. Newman & Judith S. Gold, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279 (1986); *A Close Look*, *supra* note 14.

¹⁷ Steven C. Bennett, *The Arbitration Blame Game: Notes on Developing an Effective Corporate Arbitration Program*, DISP. RESOL. J., Feb.–Apr. 2005, at 34, 35 (citing Steven C. Bennett, *Court Ordered ADR: Promises & Pitfalls*, 71 PA. B. ASS’N. Q. 23 (2000)); Stempel, *supra* note 15, at 374 (“ADR has been ‘sold’ (or ‘oversold’) as a means of reducing court costs”—but might not deliver the savings promised); Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 843, 843, 848, 852–53 (2004) (discussing JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996) and DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (1997)); Edmund V. Ludwig, *A Judge’s View: The Trial/ADR Interface*, DISP. RESOL. MAG., Summer 2004, at 11, 11 (“Both the Civil Justice Reform Act of 1991 and the Alternative Dispute Resolution Act of 1998 were aimed at judicial cost and delay reduction.”); CPR International Institute for Conflict Prevention & Resolution, *Mediation Procedure*, http://www.cpradr.org/med_intro.asp?M=9.2.1 (last visited on Dec. 20, 2005).

¹⁸ See MAYER, *supra* note 3, at 31, 53; Howard J. Aibel, *Mediation Works . . . Opting for Interest-based Solutions to a Range of Business Needs*, DISP. RESOL. J., Apr./Sept. 1996, at 24, 25–27; William F. Baron, *High-Tech/High Resolution: ADR in Technology Disputes*, DISP. RESOL. J., Apr./Sept. 1996, at 88, 91; see also Bennett G. Picker, *How to Best Aid Negotiation by Breaking Down Barriers*, 19 ALTERNATIVES TO HIGH COST LITIG. 251, 266 (2001) (stating that good mediators “will involve the parties directly in the search for solutions”); Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 838 (1998) (citing direct involvement of the parties as a “typical aspect of mediation”).

and to tap them as sources of common sense and sound business judgment in settlement negotiations.¹⁹ This enhanced involvement promised to reduce party alienation from the adjudicatory process and to give litigants a greater sense of control over their own dispute resolution fate. Mediated interactions between the parties also were seen as a way to reduce inter-party friction, to promote less destructive and costly dynamics across both party and lawyer lines. Those involved hoped that the net result of all this would be appreciably greater “user satisfaction” with the justice system as a whole.

As experience with ADR processes increased, another promise surfaced more visibly. Proponents of court programs believed that ADR processes could enhance the quality of justice²⁰ in several ways. The new processes could foster more direct, less cluttered, and more informative communication across party lines. They also could help litigants and lawyers identify more reliably and understand more clearly the relevant evidence and law—as well as the competing lines of reasoning about what factual and legal conclusions might be drawn. Armed with these more refined understandings, the parties could more readily identify the matters that truly separated them—thus sharpening the joinder of issues for negotiation, further discovery and motions, or for trial. In all of these ways, ADR processes could enhance the rationality of the disputing process—and, thereby, increase the likelihood of achieving fair results through settlement or trial (“fair results,” in this context, meaning the results that would be produced by error-free application of the pertinent legal principles to the real historical facts).

Additional, substantially more ambitious claims have been made for some forms of mediation. Some proponents of transformative mediation have urged that it can transform not only the nature of the disputing process, but also the longer-range relationship between the disputants.²¹ Even more ambitiously, it has been suggested that substantial participation in appropriately handled mediation can cause fundamental transformations in

¹⁹ Wayne D. Brazil, Michael A. Kahn, Jeffrey P. Newman & Judith Z. Gold, *supra* note 16, at 280.

²⁰ 25 *Years After Pound*, *supra* note 14, at 104–06 (discussing surveys of perceived fairness); Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57, 64–65 (2004); Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 581–82 (2004) (discussing “procedural justice”).

²¹ ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 53–84 (rev. ed. 2005); Victoria Pynchon, *Can Transformative Mediation Work in Commercial Litigation? A Conversation with Joseph P. Folger & Robert A. Baruch Bush*, SCMA NEWS (S. Cal. Mediation Ass’n, Los Angeles, Cal.), Feb. 2005, at 1.

the disputants' values and behaviors.²² A positive mediation experience, it has been asserted, can rearrange the parties' sense of what is important and reorient them from preoccupation with self to concern about others and the health of the larger community. We acknowledge these farther-reaching "promises" because they might be used to mount attacks on the credibility of court-connected ADR—even though the vast majority of courts would disavow any such ambitions for their programs.

B. To What Extent Have the Promises Been Kept?

At the outset, it is important to emphasize that the answer to this question is not the same for all court programs or for all promises. It is impossible to generalize reliably because there is such a huge range of programs, with major differences in setting, purpose, design, quality, and quality control, as well as other variables. These facts make it impossible to generate an accurate global or aggregate assessment of court ADR programs.²³

It also is important to acknowledge that there likely are courts in which the provision of ADR services is so loosely controlled that the word "program" is a generous misnomer. Useful insight into the potential of ADR programs generally should not be expected from examining litigants' experience with mediation—or other forms of ADR—in such settings. Instead, the focus of any effort to fairly assess potential in this arena needs to be on courts with thoughtfully designed, mature programs that are carefully administered and actively monitored.

When we look at such programs, we find considerable evidence that many of the promises we are trying to track are being kept in significant percentages of cases. For example, there is substantial evidentiary support—even if no unassailable empirical proof—for the view that strong court ADR programs can reduce cost and delay for significant percentages of litigants.²⁴

²² BUSH & FOLGER, *supra* note 21, at 20–21; Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 12–21 (1989); Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263 (1996). Cf. Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 OHIO ST. J. ON DISP. RESOL. 669, 715–58 (2003) (suggesting that ADR can be more successful if participants are aware of their behavioral tendencies and are empathic to other parties).

²³ For the most comprehensive review, to date, of published assessments of court ADR programs, see Roselle Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q., 55, 58–59, 65–66, 74, 78 (2004).

²⁴ STIENSTRA ET AL., *supra* note 17, at 12–13, 16–25; Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for*

While the authors of the RAND study, which drew data from relatively young and evolving programs²⁵ in six federal district courts, concluded that their data did not support findings one way or the other on these issues,²⁶ the Federal Judicial Center's assessment of programs in two other federal district courts yielded positive findings.²⁷ Moreover, the Judicial Center's study in one of these two courts was based on comparative analyses of control groups—a very rare commodity in the world of judicial administration. It also is important to bear in mind that the percentage of litigants who report a belief that participation in an ADR process increased their net litigation costs is invariably much lower than the percentage of litigants who report a belief that participation reduced those costs or did not affect them in one direction or the other.²⁸

Even more compelling support exists for conclusions about how parties and lawyers feel about court sponsored ADR programs—and in a democracy, feelings about the quality and usefulness of the services courts provide are

Reducing the Cost and Time of Litigation, 14 OHIO ST. J. ON DISP. RESOL. 1, 24–27 (1998) (citing some positive studies while noting that overall findings are mixed).

²⁵ KAKALIK ET AL., *supra* note 17, at xxxiv–xxxv.

Given that most mediation and neutral evaluation programs have been in place in federal court for only a few years, refinements should be expected Since the time when the cases in our study were referred to ADR, a number of the study districts have changed the timing and method of the referral, the number and types of cases deemed appropriate for inclusion, or the length and timing of the ADR session itself. Perhaps most important, mediators and evaluators have had time to acquire experience in conducting the sessions

Id. Moreover, a significant change was made in program design in at least one of the six programs toward the end of the study period. From 1992 through mid-1995 participation in court-sanctioned mediation in the Eastern District of New York was voluntary but the parties were required to pay the mediator's fee. In contrast, the court could compel parties to participate in ENE, but the parties were not charged a fee by the evaluator. In mid 1995 the court changed its rules so that the judges also could compel participation in mediation but relieved parties who were so compelled of the burden of paying a fee to the mediator. *Id.* at 229–30.

²⁶ [Data from the six studied] programs,

as implemented . . . provided no strong statistical evidence that time to disposition, litigation costs, or attorney views of fairness or satisfaction with case management were significantly affected, either positively or negatively We have no justification for a strong policy recommendation because we found no major program effects, either positive or negative Participants in these ADR programs are generally supportive of them Most of them felt that the programs were worthwhile both in general and for their individual cases.

Id. at 4.

²⁷ STIENSTRA ET AL., *supra*, note 17, at 16–25.

²⁸ See *id.*; Wissler, *supra* note 23, at 58–59, 65–66, 74, 78.

very important facts and forces in themselves. Many published studies report that the vast majority of users of court ADR programs approve of and value them—even when the lawyers and litigants are not sure whether going through the ADR process resulted in savings of money or time.²⁹ Notably, even programs in which participation by the parties is compelled often receive high approval ratings.³⁰ Thus, there is ample evidence that participation in a well-run ADR program can improve parties' overall satisfaction with their experience in the judicial system. That fact is of no small significance. It suggests that thoughtfully designed and carefully administered court ADR programs can enhance feelings of gratitude toward and a connection with our polity.

C. New Understandings of Court ADR's Core Promises

Because he focuses in *Beyond Neutrality* primarily on mediation in the private sector, Mr. Mayer may not be aware that some proponents of court ADR have come to new understandings of the central promises these programs can make. From this new perspective, the core promises center around the idea of courts reaching out to litigants to offer them opportunities that they otherwise might not have.

This "reaching out" is rooted in some fundamental acknowledgments. One of these is that parties come to the courthouse with a wide range of values and interests. The values and interests that are most important to any particular set of parties—at least in relation to a given dispute—may be quite different from the values and interests that the law formally acknowledges or that serve as the drivers in the traditional adjudicatory process. Court ADR programs can be shaped to permit the parties to decide for themselves which values they care about most in an individual case—and then to select from an array of processes the one that offers the best opportunity to pursue those values.

A second fundamental acknowledgment that informs ideas about what court ADR programs really promise is more commonly understood and comes into play more often. It is an acknowledgment that traditional litigation is too expensive, too time consuming, and too riddled with friction for many parties and cases, and that because of these facts, traditional litigation simply is not a means that many parties can use to resolve their

²⁹ KAKALIK ET AL., *supra* note 17, at 4, 51; MAYER, *supra* note 3, at 55–56; Stipanowich, *supra* note 17, at 853–59, 861, 863 (discussing D. STIENSTRA ET AL., *supra* note 17, at 173–76, 191–93, 206–10, 215–18, 231–32); Welsh, *supra* note 20, at 580–81; Wissler, *supra* note 23, at 58–59, 65–66, 74, 78.

³⁰ STIENSTRA ET AL., *supra* note 17, at 191–93, 231–32. *See also* 25 Years After Pound, *supra* note 14, at 93, 103–05.

disputes. This acknowledgment can be especially significant to the people when it is made directly by a court—because it represents a public institution's honest self-assessment and its concern to try to do better. Moreover, this kind of acknowledgment acquires program-building power when it is accompanied by a firm belief that courts, as the branch of government charged with primary responsibility to help the people resolve their disputes, have an elemental duty to provide parties with readily accessible tools that they can use to try to protect their rights and to accommodate competing interests. Built on these converging premises, good court ADR programs demonstrate to the people that courts understand that their primary mission is to offer meaningful, useable service to people with dispute resolution needs that they cannot otherwise meet.³¹ By offering good ADR programs, courts communicate that their primary orientation is outward, toward serving the people, not inward, toward institutional self-protection. Thus, a good court ADR program promises a spirit of service that recognizes the parties' interest in prioritizing their values and their entitlement to procedures that at least create a meaningful opportunity for them to try to resolve their disputes in a manner and on a time frame that is consistent with their sense of what is at stake. The promise, in short, is to try to provide real help through a range of truly accessible process opportunities.

Courts whose ADR programs demonstrate this purpose and orientation earn the respect and gratitude of the people. By encouraging more respect for and gratitude toward a principal branch of our government, such programs strengthen the bonds between the people and their democracy.

III. DOES COURT ADR PROMOTE A TWO-TIERED SYSTEM OF JUSTICE?

The system of justice was two-tiered long before courts began establishing ADR programs—and it will remain two-tiered regardless of whether or not courts continue to offer ADR services. Money separates the two tiers. Those who have it get first tier justice. Those who do not have it, or whose case does not carry a clear promise of generating it, get the second tier version, or none.

Court provision of ADR services begins with an acknowledgment of this reality and is intended to be responsive to it. Courts that provide ADR services at no cost, or for below market fees, can reduce the disparity

³¹ It is important to emphasize, again, that the kind of programs I have in mind offer litigants ADR services for free or at least at prices well below market. Courts that send parties into the private sector to pay for ADR services at full market rates make none of the acknowledgments and demonstrate none of the orientations described in this section of the text.

between the level of public service that courts provide to the “haves” and the level of service courts provide to the “have-nots.”

Court provision of inexpensive or no-cost ADR services also can increase the percentage of have-nots to whom the courts are accessible in fact, rather than only in theory. For most have-nots, the courthouse doors, as traditionally configured, remain locked. The only have-nots with keys that can open courthouse doors are those whose claims (1) are likely to be perceived by lawyers as strong on the merits (liability appreciably more likely than not), and (2) are likely to generate either a substantial and collectable pot of money or a collectable attorneys’ fees award. Have-nots who are not so fortunately situated are much less likely to find representation and much less likely to see any point in filing a lawsuit—at least if they understand how much financial staying-power will be demanded of them before the court will give them a trial or rule on a dispositive motion. But such litigants might be more inclined to try to use the judicial system if they—and their prospective counsel—could see that, relatively early in the pretrial period, the court would provide them—at little or no cost—a meaningful opportunity to address the merits of their dispute directly with the other parties and to try, with the aid of an experienced neutral, to forge a settlement.

There is another perspective from which policymakers might ask whether court provision of ADR services tends to create a two-tiered system of justice. Does court provision of ADR services perpetuate a two-tiered system of justice by taking pressure off legislatures to improve access to and reduce the cost to users of adjudicatory processes? The short answer is no. Given all of the budgetary pressures under which governments at all levels seem destined to labor for the foreseeable future, it seems almost laughable to suggest that legislatures would provide significant additional funding for courts if the courts abandoned their ADR programs. The litigants to whom court ADR services are most important are not likely to have anywhere near the clout with legislatures as their wealthier institutional counterparts—many of whom already have found a substitute for a good public court system in private ADR providers. The substantial growth of the market for “private” justice strongly suggests that there would be much more pressure on legislatures to funnel improvement money into the public court system if private ADR providers removed themselves from the scene than if courts stopped offering ADR services.

Before shifting our focus away from the topic of two-tiered justice we should highlight an assumption that some critics of court ADR seem to bring to this debate. Some critics assume that the “justice” that is provided, in theory, by traditional adjudication is better—top tier—than “justice” that is

accessible by agreement between the parties through an ADR process—bottom tier. Is this assumption well made?

There is no easy answer to this question—and no one answer is likely correct for all situations or as measured by all criteria. It does seem important to emphasize, however, that the question is hardly self-answering—and that in some cases all the parties are likely to feel that the justice that ADR is capable of delivering is superior to the justice that traditional adjudication would yield. Among other features that distinguish it from litigation, mediation permits the parties to decide for themselves which criteria or values should be used to determine what constitutes a “just” disposition in their specific circumstance. So for litigants who ascribe greater weight to some values or considerations than would be ascribed in an adjudication, ADR offers access to a more attractive result.

IV. WHAT WOULD HAPPEN IF THE COURTS DROPPED ADR PROGRAMS?

This question is most significant for court programs that offer ADR services for free or at rates well below market. If such courts were to drop their programs, many poor litigants would have little or no access to private or public ADR services. Presumably, the same “no-ADR-service” fate would befall many cases of limited economic value. As the gap between realistic case value and the cost of securing ADR service in the private sector narrows, there probably is a roughly parallel decline in parties’ willingness to make an investment in a proceeding that cannot promise to deliver closure.

As important, if courts abandoned free or low cost ADR programs, many poor litigants and small cases likely would end up receiving no meaningful service whatsoever from an entire branch of their government. As noted above, for such litigants and cases, trial is a mirage. So is substantial pretrial litigation. Thus, for litigants without significant financial resources or clear access to substantial damages, or attorneys’ fees, the only viable alternatives, in a court that does not provide ADR services, are to try to directly negotiate a quick settlement or to give up. Leaving any significant percentage of our population with only these options would represent a major failure of government.

The private ADR provider community and the ADR “movement” also would suffer substantial losses if courts dropped their ADR programs. Court programs have been important sources of enrichment and stimulation in the development of ADR generally. Whole new processes, like early neutral evaluation, have been developed in court programs.³² Court programs also have been sources of refinement in and learning about other processes, like

³² Wayne D. Brazil, *ADR and the Courts, Now and in the Future*, 17 ALTERNATIVES TO HIGH COST LITIG. 85, 85, 99 (1999).

mediation, that were initially developed in other settings. Courts have deepened thinking in the ADR field about ethical issues—as court policymakers and program administrators have addressed ethical dilemmas their neutrals have encountered during their work for the courts and have developed ethical rules and guidelines to discipline the provision of services in their programs.³³

Circumstances unique to court programs make them especially rich sources of learning for the field at large. Driven by a sense of institutional responsibility for the character and quality of programs they sponsor and, in some instances, by statutory mandate,³⁴ courts have been pushed into a “regulator’s role” in this field. As they have worked from scratch through the full implementation of their programs, they solicited, researched, and debated various program design options; they have crafted rules for parties and neutrals; they have set up and monitored programs to train neutrals and to educate lawyers and clients; they have fielded questions from their neutrals and helped them shape responses to process challenges and ethical dilemmas; they have hosted in-service seminars of mature neutrals who teach one another, and the court, effective techniques, search for creative solutions to recurring problems, and suggest experience-based modifications to existing rules or process models; they have systematically collected feedback and evaluations from parties, their lawyers, the neutrals, court personnel, and judges; and they have collected and analyzed empirical data about a host of aspects of their programs.

Required to satisfy so many mandates, and fed so much information through so many channels, the people who design and run court ADR programs are uniquely positioned to generate learning that can be valuable for ADR practitioners and policymakers in a wide range of private and public settings. In short, court programs constitute the most instructive laboratories for the entire field of ADR. They may well be the only settings in which controlled experiments involving sizeable samples of participants can be

³³ See, e.g., WAYNE D. BRAZIL, *EARLY NEUTRAL EVALUATION IN THE NORTHERN DISTRICT OF CALIFORNIA: HANDBOOK FOR EVALUATORS*, 70–80 (rev. ed. 2001). This is a training manual published by the United States District Court for the Northern District of California.

³⁴ See, e.g., Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651, 653 (2000). These provisions, among other things, require each federal district court (1) to establish an ADR program “in accordance with this chapter,” (2) to designate a judge or court employee “who is knowledgeable in alternative dispute resolution . . . to implement, administer, oversee, and evaluate the court’s ADR program,” (3) to “promulgate its own procedures and criteria for the selection of neutrals on its panels,” (4) to assure that each person serving as a neutral in the court’s program is “qualified and trained to serve as a neutral in the appropriate [ADR] process,” and (5) to “issue rules . . . relating to the disqualification of neutrals.”

conducted.³⁵ Furthermore, federal trial courts are required by Congress to evaluate the experiences and data such experiments produce. Such evaluations could help demonstrate the potential benefits of various forms of ADR to broader segments of the population—thus spurring greater demand for ADR services from private providers. In addition, by drawing from systematically collected data and from the experiences and innovations of individual neutrals serving in their programs, courts can help develop or adjust an array of ADR process models and can identify new practice techniques or tips for both neutrals and parties.

There is an additional way that court programs can serve as important sources of learning about the field of ADR—and as important arenas for developing norms for conduct in that field. Good court programs provide mechanisms by which participants in sponsored ADR processes can complain and seek relief when they believe that a party, a lawyer, or a neutral has violated one of the program's rules or has failed to meet one of the program's requirements. Such complaints, and the responses to them by other participants, can shed light on dynamics inside the ADR events and can help policymakers develop strategies for preventing, defusing, or responding to potential problems.

Moreover, when such complaints mature into contested proceedings, judges are called upon to make rulings and to develop standards that may have widespread applicability.³⁶ Through these kinds of disputes, judges develop law and policy in a host of subjects, including conflicts of interest, confidentiality, the play between ADR proceedings and the operation of traditional privileges and work product protections, the scope of neutrals' authority and the extent of their immunity or other protections, and the appropriateness of various behaviors by neutrals and other participants in particular kinds of ADR processes. Through opinions and rulings on issues like these that arise in their programs, courts can become sources of legal discipline and ethical guidance for the field at large. If courts dropped their ADR programs, there would be appreciably fewer occasions for learning from this source.

³⁵ One of the best examples of such experiments was designed and implemented in the early and mid-1990's by Kent Snapp (as the ADR program administrator) in the United States District Court for the Western District of Missouri. See STIENSTRA ET AL., *supra* note 17, at 215–54.

³⁶ See, e.g., *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003); *County of L.A. v. U.S. Dist. Ct. for the C.D. of Cal.*, 223 F.3d 990 (9th Cir. 2000); *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994); *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164 (C.D. Cal. 1998), *aff'd* 216 F.3d 1082 (9th Cir. 2000); *GTE Directories Serv., Corp. v. Pacific Bell Directory*, 135 F.R.D. 187 (N.D. Cal. 1991); *Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464 (Cal. Ct. App. 1998).

Withdrawing of judicial sponsorship of ADR programs also could hurt the field by undermining the sense of "legitimacy" and "validity" that court endorsement may confer on ADR processes. At least some portion of the population likely would interpret a widespread judicial retreat from this arena as sending some kind of negative message about the wisdom of using means other than the courts to resolve disputes. Thus, even if driven by entirely unrelated motives, court abandonment of ADR might undermine public confidence in the integrity and effectiveness of ADR generally, thereby discouraging new users, if not established customers.

A related consequence of court withdrawal from ADR warrants mention here. Court programs have played a major role in accelerating familiarity with and acceptance of alternative dispute resolution processes. By mandating or encouraging the use of mediation, early neutral evaluation, and non-binding arbitration, courts have extended exposure to and experience with these procedures into a much broader portion of the population. For the most part, these judicially prodded experiences have been positive. As noted earlier, in most surveys of litigants and lawyers, even in mandatory court programs, high percentages of respondents report positive feelings about court referred ADR processes.³⁷ The discontinuance of court ADR programs would deprive the field of this important source of converts and would slow the spread of familiarity with alternative dispute resolution processes. Less experience means more ignorance—and more ignorance means more fear. Fear of the unknown is a barrier to first use, and the field should not welcome artificial barriers to first use.

Court withdrawal from ADR would be accompanied by one additional negative consequence. After substantial periods of resistance and ambivalence, the executive and legislative branches of the federal government have decided that ADR can be a valuable tool and have endorsed or mandated its use, in one form or another, in a wide variety of settings. If the judiciary were to abandon ADR, it would, in effect, cede to the other two branches of government the power and responsibility to develop and to provide all forms of dispute resolution service other than litigation. For at least two major reasons, such a wholesale surrender would be unwise.

First, among the three branches of the government, the courts have the deepest and richest experience with dispute resolution processes—and it is the courts that have the greatest expertise in working to assure procedural

³⁷ KAKALIK ET AL., *supra* note 17, at 44–45 and 49–51; MAYER, *supra* note 3, at 55–56 (discussing participant satisfaction); BARBARA S. MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 70–73 (1990); Stipanowich, *supra* note 17, at 853–59, 861, 863 (reviewing N.D. Cal. program & satisfaction with it); Welsh, *supra* note 20, at 580–81 (discussing participant satisfaction); Wissler, *supra* note 23, at 55, 58–59, 65–66, 74, 78 (discussing participant satisfaction).

fairness. Because of its experience, the judiciary is the branch of government best positioned to detect, and to assess the magnitude of, different kinds of threats to process integrity. Moreover, this view is likely shared by a substantial percentage of the population. Given the courts' process expertise, and the public's confidence in that expertise, the branch of government under whose wing it makes the most sense to develop and regulate new procedures for resolving disputes is the judiciary. The courts are less likely than the other branches to err in this arena—and their endorsement of new procedures is likely to carry more weight with the people—and thus to be more helpful to the ADR "movement."

Second, ceding the public sector's responsibility for all dispute resolution processes, other than litigation, to the other branches of government would threaten to reduce the role and significance of the third branch. If growing percentages of parties whose rights have been invaded cannot afford to seek protection through adjudication, a substantial share of public dispute resolution work can be expected to gravitate toward another branch of government, especially if that branch offers ADR services. If the judiciary provides no such service, its share of dispute resolution work will decline considerably.

Were that to happen, the judicial branch would become less relevant to the people, who, in turn, would be less interested in or concerned about any decline in the judiciary's institutional health—including reductions in jurisdiction and budgetary support. With less support from the people, narrower jurisdiction, and fewer resources, the judiciary's standing as a co-equal branch of government would be jeopardized, potentially compromising its capacity to perform the crucial role assigned to it under our constitutional system. An anemic judiciary might find it difficult to serve as an effective check and balance on the other two branches of government. While this kind of scenario obviously is in no sense imminent, and may appear to be the product of little more than a paranoid third branch imagination, it would be unwise to discount it completely.

V. WHAT WOULD HAPPEN IF COURTS OFFERED ADR SERVICES ONLY TO POOR LITIGANTS OR TO CASES OF LIMITED MONETARY VALUE?

With privatization being so fashionable, at least in some quarters, policymakers will surely be asked why court provision of free or low cost ADR services should not be confined to litigants with limited resources or to cases of limited monetary value.³⁸ This is a serious question not amenable to

³⁸ This issue is already being pressed by some high-visibility members of the private mediation community in southern California. See, e.g., Blair Clarkson, *Dissention Growing Among Mediators*, DAILY J. (S.F.), June 9, 2005, at 3 (reporting complaints by

a simple answer. But before making a decision to limit provision of ADR services to poor litigants or modest-value cases, courts should give careful consideration to several significant public policy questions and should squarely face several potentially negative consequences of such a change.

It is important to recognize, at the outset of this discussion, that the percentage of civil cases that could be deemed to "need" free or low cost ADR services might be quite substantial. While the criteria for defining need in this setting are subject to debate, and while cut-offs could be set at some pre-determined arbitrary figure—focusing on either the resources of the parties or the amount in dispute³⁹—policymakers should at least consider using a ratio between the real economic value of a case, or the resources of the parties,⁴⁰ and the foreseeable costs of litigation as a criterion for determining when to offer free or low cost ADR services.

I hypothesize that there is a huge "middle class" of civil cases in American courts, or of civil disputes involving judicially cognizable rights that could be pursued in our courts. As I discussed in an earlier section of this essay, I further hypothesize that litigants who have cases in this class very often receive little useful help from our public courts and that, in an important sense, they really need free or low cost ADR services. While I am not aware of any systematic empirical study that discloses the median real⁴¹

mediators about state courts providing free mediation services to parties who could afford to pay).

³⁹ Even if apparently simple criteria were established for determining which litigants or cases were entitled to free or low cost ADR services, it probably would be quite difficult to apply these criteria fairly. Moreover, administering a program that tried to draw such lines could be very labor intensive and often could require deep invasions of financial privacy. Would the courts require every litigant to submit audited or notarized financial statements and tax returns? How would program administrators treat non-liquid assets like equity in a home or anticipated value in a pension plan? What about community property, or the resources of partners or joint venturers? Courts that already feel labor-starved, as most do, are not at all likely to be interested in taking on the work that such a system would entail. Nor is it obvious that the purposes or goals of such a system could justify the invasions of privacy that it would entail (through excursions into financial matters that often would be irrelevant to the parties' positions on the merits).

⁴⁰ Money, of course, is no measure of the real value or significance of a good many cases, for example, those based on violations of fundamental constitutional rights. How program administrators would decide whether such cases deserved free or low cost ADR services would present an additional challenge of considerable magnitude. Another difficulty would arise when one party to a case was clearly poor but the opposing party was wealthy. Would it be appropriate to provide ADR service to the poor litigant for free but to make the wealthy party pay? What if the wealthy party was the defendant in a case with no merit?

⁴¹ I use the term "real" to refer to the figures at which cases are actually settled or the dollar amounts of judgments actually entered (as augmented by any awards of costs

economic value of civil cases in federal district courts, or in state courts of general jurisdiction, I suspect, based on more than two decades of experience in a federal district court, that the figures would be surprisingly modest—and, for state courts at least, well under \$100,000. If that suspicion is correct, there would be a clear disproportion between the real value of most civil cases and the cost of processing them all the way through the traditional adjudicatory system to judgment at the close of trial—a cost that can easily reach many tens of thousands of dollars, at least in urban America, even for matters that seem relatively straightforward.

It is arguable that all the cases that fall into this great middle class (defined by disproportion between legal system transaction costs and economic case value) should be offered free or low cost ADR services—on the theory that parties who have *judicially cognizable claims* should receive some service of real value from the *judiciary* and that for this class of cases such a service often can be provided only in the form of an ADR session.

Trying to restrict court provision of ADR services to small cases or poor litigants also would increase the risk of creating, or of being perceived as having created, a two-tiered system of “ADR justice.” There is a real risk that neutrals, judges, litigants, and lawyers would simply assume—without empirical support—that ADR for poor people and little cases is less sophisticated, less challenging, and worthy of less time than ADR for wealthy litigants and big cases. If that belief took hold, the “prestige” that attaches to service on the courts’ panels might well suffer, making it more difficult to recruit top-flight neutrals to serve. Moreover, neutrals who work in a program that serves only smaller cases might be tempted to give those cases shorter shrift—to assume that they do not require the same level of preparation, energy, creativity, and attention to persons and issues that bigger cases warrant. The upshot might well be that the smaller cases and the poorer litigants would end up receiving a second class version of ADR service from the courts’ neutrals.

But even if there were no decline in the level of service actually provided, there might well be a decline in appreciation of that service and in confidence in its quality. In a world where value and money are so often conflated, limiting court ADR programs to poor litigants and small cases would invite inferences that the service that was publicly provided was second rate—that the “real” or “best” ADR processes were available only in the private sector at high market prices. The spread of that belief would jeopardize the sustainability and quality of the courts’ programs. It also could intensify class resentments and discourage litigants with limited resources or small cases, measured in money, from taking ADR as seriously as their

or attorneys’ fees that are in fact made). The real economic value of cases may bear little relationship to the amounts set forth in prayers for relief.

interests would justify and from appreciating all the ways they could use ADR to pursue values of importance to them.

If, because of assumptions about smaller cases or litigants with limited resources, neutrals in court programs drifted toward putting less energy and thought into performing their roles, the ability of the programs to innovate, to refine process tools and protocols, to develop the most subtle or effective techniques, and to teach and to inspire new neutrals to perform at the highest levels could be seriously compromised.

The suggestion that courts limit the provision of ADR services to certain classes of cases also raises some larger policy concerns. Is it appropriate for courts to provide all classes of cases the full complement of adjudicatory and case management services for free, but to make the parties in some classes of cases pay for ADR services? Should public courts not strive to provide some meaningful service to all persons with judicially cognizable disputes who need to turn to the court system for help because they have not been able to solve their problem by agreement? And why should public courts endorse—by providing for free—only one kind of procedure, adjudication, for addressing disputes, especially when that procedure arguably sanctions—or at least is sometimes assumed to offer safe harbor to—aggressive and self-serving conduct, tolerates considerable inter-party friction, imposes massive transaction costs, and is very slow to yield results? Why should the court system provide only one kind of process if the parties prefer an alternative procedure that seems likely to better serve their interests and values, or to produce a disposition faster and at less cost?

These questions become more difficult to answer satisfactorily in courts that *compel* parties to participate in an ADR process. Why should mediation, for example, be the only mandatory component of a court process for which parties are required to pay a substantial fee?⁴² And why should the parties be forced to pay such a fee to some private provider rather than into the public treasury—a payment that at least could be rationalized as a quid pro quo for provision by the public of the service?

VI. GETTING BEYOND GETTING A DEAL IN COURT-SPONSORED MEDIATION

Another important reason for court-sponsored ADR programs to survive occurred to me while I was reflecting on some of the themes in Bernard S. Mayer's book, *Beyond Neutrality*. Mr. Mayer might have considered titling

⁴² Requiring parties to pay a substantial fee to proceed through a court-compelled mediation might set a precedent that could tempt policymakers to require litigants to pay for components of the traditional adjudicatory process, e.g., hearings on motions and trials.

his book *Beyond Getting a Deal*. One of his primary purposes is to encourage mediators to appreciate that contributions of real value can be made through the process of engagement in negotiation, regardless of whether a deal is reached. Mr. Mayer argues, with considerable persuasive force, that parties can derive important benefits from the fact and character of engagement—from the fact that they negotiate and how they go about the process.

This insight led me to compare court-sponsored mediation to private mediation from a new perspective. I asked: Which arena of mediation, court-sponsored or purely private, could offer mediators and parties the best opportunity to appreciate and to achieve the benefits of engagement, independent of whether deals are made or how favorable or enduring their terms are? For reasons I will explain, the best hope for encouraging this re-focused role for mediators and this expanded sense among all participants, of the value of mediation, may well be in some kinds of court-sponsored mediation programs. Realizing this potential could become a substantial additional reason to make sure that court sponsored mediation programs, at least of a certain character, not only survive, but also thrive.

Before describing the reasoning that supports this notion, it is important to acknowledge that many observers would suggest exactly the opposite view. Considerable concern has been expressed that the widespread adoption of mediation programs by courts poses a threat to the integrity of mediation as a truly alternative process.⁴³ The conventional wisdom among many private mediators has been that court-sponsored mediation programs are something of a necessary, and hopefully temporary, evil. While such programs generate opportunities to mediate and to expose parties and lawyers to mediation, they also threaten to corrupt mediation as a psychologically and philosophically distinct process.⁴⁴

Some commentators have feared that lawyers and litigants, supported or pressured by judges and court administrators, would cut process corners in mediation and infect it with an adversarial and tactical spirit, as well as with a preoccupation with “winning,”⁴⁵ that are fundamentally at odds with the spirit that many mediators hope to encourage—a spirit that is constructive

⁴³ See Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 245–46; Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 517 (2004); Welsh, *supra* note 15, at 135–40; Cf. Nolan-Haley, *supra* note 20, at 64–65.

⁴⁴ Welsh, *supra* note 15, at 136–40.

⁴⁵ Craig A. McEwen & Roselle L. Wissler, *Finding Out If It Is True: Comparing Mediation and Negotiation Through Research*, 2002 J. DISP. RESOL. 131, 131–32; Thompson, *supra* note 43, at 510, 514.

and open, goalless and guileless, permeated by real listening and real learning. In the minds of many mediators, encouraging parties to move into this kind of spirit is essential to “success” in mediation. In fact, in some theorists’ views, a principal purpose of mediation is to teach the parties the benefits that can flow from inhabiting this spirit.⁴⁶

Given this conventional wisdom, what is the line of reasoning that might lead us to look to court-sponsored mediation as the arena with the greatest promise for encouraging mediators and parties to focus less on “outcome” and to find greater value in the character of engagement? The explanation emerges when comparing, in the paragraphs that follow, mediation in the private sector with mediation in two different kinds of court program contexts. This comparison will not do justice to the complex and variable realities of mediation in any of these three arenas. While I need to oversimplify to make the line of reasoning clear, I hope there is some soundness in the central thrust of the argument.

We begin on the private side. As I use the phrase here, “private” mediation refers to a process or event in which the mediator works for compensation and the sole source of that compensation is the parties. Thus, “private mediators” are professionals, earning at least part of their living from the fees they charge as mediators. The parties select these mediators in the private market; they are neither provided by nor paid by a public institution or a non-profit organization.

In a substantial percentage of purely private mediations, the mediators are likely to feel that what they are really getting paid for is to get a deal. At least when their disputes revolve principally around money, private parties pay substantial fees⁴⁷ to professional mediators not primarily to engage, but to resolve. They pay because they have come to believe that the alternatives to getting a deal are too risky or too costly (measured in money or some other significant value). So they expect their mediator to increase the odds, dramatically, that they will reach an agreement. Given this overriding goal, the parties often are not overly concerned about how mediators go about their

⁴⁶ FLA. STAT. ANN. tit. 32A, R. 10.220 (2003) (stating that the Rules for Certified and Court Appointed Mediators stipulate that the “role of the mediator is to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute”); GA. ALTERNATIVE DISP. RESOL. app. C, ch. 1, I (2005) (stating that the Ethical Standards for Mediators require mediators to explain “that parties who participate in mediation are expected to negotiate in an atmosphere of good faith and full disclosure of matters material to any agreement reached.”); Thompson, *supra* note 43, at 556–57.

⁴⁷ Some mediators regularly charge \$10,000 a day for their services.

jobs. The end matters most, not the means. It matters less how the barriers to agreement are removed than the fact of their removal.⁴⁸

When getting a deal is the dominating objective, both mediators and parties are likely to be less resistant to cutting ethical corners, or to following process paths that depart from the main road of mediation theory, or to their neutral playing a heavy evaluative hand. The parties are more likely to accept being pushed or manipulated a bit—they may even expect it—as long as the mediator seems to be pushing and manipulating all parties more or less equally.

In short, when parties decide to retain private mediators and to pay them substantial sums, they are likely to come to the mediation with a clear goal: to get their dispute behind them. It is that goal that dominates their participation and that value that dominates their assessment of how good, and effective, the mediator is. Mediators who understand their mission in these terms, who know that the quality and value of their performance will be measured largely by whether the parties make a deal, and who fear that their income stream from this line of work depends on their settlement rate, probably are not well-positioned to move the real-world center of gravity of the mediation movement toward valuing the act and character of engagement above the value of getting disputes resolved.

When we shift our focus to court-sponsored mediation we find a divided world. One part of that world is occupied by what I will call—with admitted over-simplification—“docket-oriented” court ADR. This kind of ADR program has been the principal source and target of the concern that court programs threaten the distinctive character and constructive potential of “true” mediation. The other part of the court-sponsored ADR world is occupied by what I will call “litigant-oriented” court ADR. Programs in this part of the court ADR world have been less visible and less well-understood—but they may offer the best hope for the kind of shift in

⁴⁸ Many mediators would argue, of course, that I have assumed a false dichotomy between means and end. They would contend, with considerable persuasiveness, that the key to successful barrier removal is the *manner* in which the mediator proceeds. In this view, how effective the mediator is in achieving the goal of barrier removal is a function, directly, of *how* she approaches the parties, of the *means* she uses to encourage their trust, to shift or to expand their frames of reference, to deepen their understanding, and to enlarge their vision about both the sources of their conflict and the range of possible solutions.

My description in the text exaggerates the tension between means and ends in private sector mediation. But I am confident that there are cases in which the tension is real, or at least is perceived as real, especially when the dispute revolves primarily around money, when the mediation occurs within the context of threatened or pending litigation, and when the parties have hired mediators and committed to pay them substantial sums for their work.

appreciation of mediation that Bernard S. Mayer would like to see. The paragraphs that follow discuss first the more visible, and problematic, part of the court-sponsored mediation world.

It is likely that virtually all court-sponsored mediation programs, including those I place in the docket-oriented camp, have been inspired by several simultaneously operative motives, at least one of which is a sincere belief that mediation could offer at least some litigants and lawyers "a better way"—that through mediation parties could achieve sensible results faster, at a lower cost, and with less distraction and strain than if they litigated their cases to judgment.⁴⁹ It also seems to be true, however, that in some courts these noble motives have been accompanied, and in some measure overshadowed, by an objective that is less laudable and more dangerous—at least to mediation theory. That objective is to reduce docket pressures⁵⁰ by getting a higher percentage of civil cases settled—and settled earlier in their litigation lives.

Some court ADR programs either began with or soon developed a settlement obsession. It was docket reduction *uber alles*. In these courts, the judges, court administrators, legislators and their budget analysts, as well as some lawyers, tended to gauge the merit of mediation programs almost exclusively by their impact on the rate and timing of settlements⁵¹—and thus

⁴⁹ One of the variables that might affect which values and purposes dominate any given court ADR program is the composition of the group that serves as the primary mover in the establishment of the program. Administrators, legislators, budget analysts, and judges may be more likely to emphasize docket pressure reduction and efficiencies for the courts than lawyers, law professors, and some mediation professionals, who might be more inclined to focus on the interests of the users of the judicial system. Any generalizations like this are subject to significant exceptions, however, as is clear in the discussion in the text of the orientation of the judges whose concerns animated the establishment of court-ADR programs in the second, less visible part of the world of court-sponsored ADR.

⁵⁰ Bennett, *supra* note 17, at 35 (citing Steven C. Bennett, *Court Ordered ADR: Promises & Pitfalls*, 71 PA. B. ASS'N. Q. 23 (2000)); Thompson, *supra* note 43, at 516–17; Ludwig, *supra* note 17, at 11 ("Both the Civil Justice Reform Act of 1991 and the Alternative Dispute Resolution Act of 1998 were aimed at judicial cost and delay reduction.").

⁵¹ Sherman, *supra* note 15, at 43, 45 ("Government agencies that often use mediation . . . publish statistics on the percentage of cases settled through mediation in an effort to demonstrate the effectiveness of the process. The implication is that the settlement rate is a critical criterion for evaluating the effectiveness of mediation or a particular mediator"); Roselle L. Wissler & Robert W. Rack Jr., *Assessing Mediator Performance: The Usefulness of Participant Questionnaires*, 2004 J. DISP. RESOL. 229, 233 ("Settlement rates are often proposed as a means of monitoring mediator quality, but . . ."); Ludwig, *supra* note 17, at 12 (referencing a court program that was

by the amount of money the programs were presumed to be saving the courts and, secondarily, the parties.

Measuring the value of a mediation program by how much it reduces docket pressures and how much money it saves the court can create several dangers. The use of these yardsticks invites cynical inferences about the courts as public institutions. A program whose value the judges and legislators seem to measure primarily by how many cases it turns *out* of the courthouse encourages the people to infer that institutional selfishness drives the mediation program. Assessing the success of their programs by their impact on settlement rates makes the courts seem fundamentally inhospitable to the people they are supposed to serve. At least indirectly, it also seems to denigrate both litigation as a process and the Seventh Amendment. Preoccupation with docket reduction also makes it more difficult for judges, administrators, legislators, and lawyers to perceive and to appreciate the many other ways that mediation can deliver value to litigants.

An additional danger that flows from judging mediation by its impact on settlement rates is even more significant for this discussion. When judges and policymakers openly assess the value of a mediation program by its affect on settlement rates, they put pressure on the mediators in their programs to elevate ends over means; that is, to care more, perhaps appreciably more, about "getting a deal" than about how they conduct themselves in the mediation process. This role-distorting pressure can be substantial and can have the same effect on the character of mediation in these court programs as the pressure private mediators feel to deliver the "deals" they know they are being paid to pursue.

Thus, mediators in court programs who sense that the judges will assess the value of their service primarily by the rate at which they get cases settled will be tempted to cut process and ethical corners—even to pressure parties to agree to terms with which they really are not comfortable. When the parties see their court-sanctioned mediator sliding out of process character just to move them closer to a deal, or when they feel their mediator pressuring them to abandon objections to proposed terms, their respect for the court fades and their cynicism about their public institutions grows. It follows that, like their counter-parts in purely private mediation, the neutrals who work in a court-connected program that is conceived and valued primarily as a tool for reducing docket pressures are not well positioned to "move the movement" away from preoccupation with "outcomes."

As suggested above, there is another, less visible part of the world of court-sponsored ADR programs. What distinguishes this other part of the court ADR world from the "docket reduction" programs? How might

"curtailed" because "[i]ts yield of settlements was not significantly greater than in the control group").

mediators in these other programs respond to calls to move the movement toward greater emphasis on the value of engagement?

Programs in this other part of the world of court-sponsored mediation are distinguishable on several grounds. The most important are the purposes and values that inspired the establishment of these programs and that drive their evolution. The contrast between the motives that animated the people who founded these programs and those who were moved primarily by a desire to reduce docket pressures could hardly be greater. As described above, the fundamental orientation of the people in the latter group—judges, administrators, and legislators—was institutionally inward. Their primary concern was about the quality of the institution's—the court's—life, and about the judiciary's capacity to bear the apparently growing demands being made of it. More generously, and perhaps more accurately phrased, these policymakers were primarily interested in ADR as a tool to help protect the capacity of the judicial system to deliver high quality traditional litigation services to the relatively small percentage of cases that proceeded pretty far along the litigation track. ADR was seen as a means to move the "other" cases out of the system as soon as possible. In short, the system, not the parties, was the object of primary concern.

The orientation in the other court ADR camp was exactly the opposite. Instead of being oriented inward, toward the court, the orientation in this other camp was outward, toward the people who needed to use the court. The object of primary concern in these courts was not the system, but the parties. In these courts, judges, policymakers and lawyers were drawn to ADR, not because they were worried about docket pressures, but because they were worried about how poorly the court system treated the vast majority of civil cases⁵²—especially the cases that could not bear the burdens of expense and delay that would be imposed by extensive discovery, motion practice, and trial. Proponents of ADR in these courts recognize that the judicial system offered service of real value to too few cases and that the foreseeably formidable cost burdens of traditional litigation put the court system out of reach for many people with judicially cognizable disputes. The primary source of interest in ADR⁵³ in this other court ADR camp was a desire to

⁵² GA. ALTERNATIVE DISP. RESOL. R. IV (2005) (stating that "[t]he Georgia Supreme Court encourages every court in Georgia to consider the use of ADR processes to provide a system of justice which is more efficient and less costly in human and monetary terms"); *Id.* at app. A, R. 10 (stating that "it is inappropriate to use data concerning settlement rate as the sole basis for evaluation of a neutral"); Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 265–68 (1985).

⁵³ See, e.g., *A Close Look*, *supra* note 14, at 303; Paul Nejelski, *Court-Annexed Arbitration*, 14 FORUM 215, 215 (1978).

increase meaningful access to the judicial system and to equip the courts to offer services of real value to a wider range of cases, not a desire to show more cases the door as early in their pretrial lives as possible.

Because their orientation was fundamentally toward users of the judicial system, toward trying to meet their dispute resolution needs, and trying to offer them services that they would find truly useful and respect-worthy, the judges and policymakers in this second camp wanted to understand the full range of values and interests that litigants could seek to protect or to pursue through ADR. Thus, while their interest in ADR initially was rooted primarily in efficiency values—reducing cost and delay for litigants—they soon came to appreciate that parties could use ADR to serve many additional purposes. Mediation, for example, could be used in some cases to try to repair a party's damaged sense of self, or to restore or to begin building relationships between parties, or to give healthy vent to feelings that otherwise might go unacknowledged or undervalued.

Moreover, as judges in courts with these litigant-oriented ADR programs gained experience with mediation, early neutral evaluation, and non-binding arbitration, they began to appreciate how these processes could *enhance the quality of justice* that the court helped parties achieve. Parties and their lawyers could use these alternative procedures to cut through the thickets of pleadings, and the obscurity of responses to discovery probes to locate the issues that really mattered and to understand more clearly the evidence and the lines of reasoning that supported one another's positions. The resulting clarifications set the stage for more direct joinder of issues and more reliable exploration of the relative strengths and weaknesses of contending views. Thus informed, the parties and their lawyers could make decisions about settlement that felt more solidly based and that could yield terms that seemed fairer—more consistent with the outcome that an accurate understanding of the pertinent law and evidence would yield.

These proponents of court ADR understood that the quality of the probing and assessing of the parties' competing positions would not be as high in these ADR processes as it would have been through trial. To the vast majority of litigants, however, that fact was beside the point. For most parties, trial was not an economically feasible option. In their real world, there would be no trial. Their only alternative to ADR was unassisted and unstructured settlement negotiations—negotiations that would be conducted by counsel and from which the parties themselves would be effectively excluded. So when these parties considered the relative quality of dispute resolution processes, they were not comparing ADR with trial, but with being left by the court to fend entirely for themselves.

In that comparison, ADR shone. It could deliver clearer communication, better understanding of evidence and law, more efficient case development,

more reliable assessments of claims and defenses, and more thorough development of options. In the relatively small percentage of cases that ultimately could not be resolved by agreement, the ADR process would have helped the parties understand more clearly why they were going to trial—an understanding of considerable value,⁵⁴ given the expense and strain that trial entails.

These evolved appreciations of the ways ADR processes could enhance the quality of justice helped judges and their policy advisors in these courts understand how deep the connection is between the role in litigation of the court and the role of the neutral in an ADR process—at least in the kind of ADR process that a court could feel proud of sponsoring. Integrity of process is the central responsibility and primary concern of a court. In our system, quality of process is the heart and soul of the judicial institution. The highest values to courts revolve around means, not ends. Courts are commanded to care passionately about how we travel, but to leave concern about where we arrive to others. Thus, the primary expertise that courts can claim is in the arena of process.

Strikingly, these same values are central to mediation. Mediation theory teaches that mediators are to care more about the quality of the process they oversee, and about how the participants feel in and about that process, than about whether the parties achieve any particular end—or any end at all.⁵⁵ The core of the mediation process focuses on enhancing understanding across party lines—by improving both the tone and the clarity of communication, by encouraging broader and deeper examination of self and circumstances, and by inviting parties to temporarily replace their perspective on and their understanding of the dispute with their opponent's perspective and understanding. The abilities to listen actively but non-judgmentally, and to communicate a genuine empathy with other people and

⁵⁴ When a lawyer submits sizeable bills for trial work to her clients it is to her advantage to have their clients understand clearly the considerations and circumstances that supported the decision to go to trial.

⁵⁵ FLA. STAT. ANN. tit. 32A, R. 10.400–10.430 (2003) (detailing a mediator's responsibility to the mediation process); GA. ALTERNATIVE DISP. RESOL. app. B, I (2005) (stating that under the Requirements for Qualification and Training of Neutrals mediators must have “process expertise”); *Id.* at app. C, intro. (stating that the Ethical Standards for Neutrals require that a “mediator acts as guardian of the overall fairness of the process”); *Id.* at app. C, ch. 1, IV (stating that a mediator must assure overall fairness and protect integrity of the process); *Id.* at app. C, ch. 1, V (stating that mediators “may never claim that they will guarantee a specific result”); CPR-Georgetown Commission on Ethics and Standards of Practice in ADR, PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS (2002) (“The ADR Provider Organization has an obligation to ensure that ADR processes provided under its auspices are fundamentally fair”); Welsh, *supra* note 20, at 580–81.

their perspectives, are considered by many to be the most important skills and attributes that mediators can bring to their work.⁵⁶ It is not the mediator's role to interfere or to redirect, and certainly not to push or pressure. Thus, in mediation theory, the means are more important than the ends. In this important respect, mediation and our judicial system have a great deal in common.

There are additional ties between mediation and those courts whose primary interest in ADR is not in reducing docket pressures but in serving the needs of litigants. If there is one mantra that dominates mediation theory, it is party self-determination.⁵⁷ The mediator's focus is on the parties. The mediator's job is to help them identify and pursue, in a civil and constructive spirit, what is most important to them. This is a basic orientation that mediation shares with those courts whose primary interest in ADR is in providing a service to parties. The focus for these courts is also on the parties. Moreover, just as it is with mediators, the primary goal of these courts is to provide parties with an expanded set of tools, some of which they actually can reach and use, for pursuing the ends to which they ascribe the greatest significance.

It is this convergence of focus, purpose, and commitment to process integrity that supports my suggestion that it is in litigant-oriented court-sponsored mediation programs that we might find the best hope for moving mediators, as Bernard S. Mayer urges, toward a richer embrace of the value of engagement itself. A court that adopts ADR in order to serve the interests of parties, that cares deeply about promoting processes that engender the respect of litigants and lawyers alike, and that sees its mediators and its mediation program as extensions of itself, is likely to teach its neutrals that means trump ends, that the mediators' paramount duty is to host a process that inspires respect from parties and counsel, and that preserving those feelings is far more important than securing a settlement.

⁵⁶ See, e.g., Stephen B. Goldberg, *The Secrets of Successful Mediators*, 21 NEGOT. J. 365, 372–75 (2005).

⁵⁷ CAL. R. CT., R. 1620.3 (2005) (stating that a mediator must support principles of voluntary participation and self determination); FLA. STAT. ANN. tit. 32A, R. 10.230, 10.300, 10.310 (2003) (stating that the Rules for Certified Court Appointed Mediators emphasize self determination); GA. ALTERNATIVE DISP. RESOL. app. C, ch. 1, intro. (2005) (discussing the requirement that, under the Ethical Standards for Neutral, the “mediator will protect the self determination of the parties”); *Id.* at I (“Self determination” is “hallmark of mediation” and “is the most critical principle underlying the mediation process.”); MODEL STANDARDS OF CONDUCT FOR MEDIATORS § I (1994) (noting that “[s]elf-determination is the fundamental principle of mediation”); Symposium, *Association for Conflict Resolution Annual Conference 2003—the World of Conflict Resolution: A Mosaic of Possibilities Session on Justice in Mediation*, 5 CARDOZO J. CONFLICT RESOL. 187, 191–92 (1994).

By training its mediators in this spirit, and by visibly using these values to determine how well its mediators have served, a court locks the focus of its mediators on the character—and, by extension, the value—of process. By locking its mediators' focus on process values, the court encourages parties and lawyers to attend more carefully to these same values. This kind of setting, where the court trains its neutrals to understand that their primary purpose is not to get a deal, but to earn process respect, may offer more fertile ground for all parties to cultivate a richer appreciation of the act and character of engagement than the ground we would find in private sector mediation or in docket-oriented court ADR programs.

Thus, one reason to support the survival of mediation programs sponsored and regulated by litigant-oriented courts is that mediations in this setting may be more immune to process distorting pressures and may be truest to the core principles of mediation theory. Because courts value process so highly—much more than outcomes—and are so concerned with protecting process integrity, litigant-oriented courts may be more likely than any other public institution or any private organization to establish ADR programs that encourage both neutrals and parties to focus not simply on what terms they can get from one another, but also on the value they can derive from engagement.

VII. HOW DO WE MANAGE COMPETITION BETWEEN COURT ADR AND THE PRIVATE SECTOR?

This question, as framed by the architects of the plenary session, assumes that there is significant competition between court ADR programs and private providers of ADR services—and that that competition creates substantial problems that require concerted efforts to solve. We begin this section by asking whether these assumptions are well founded.

A. *Is There "Competition" Between These Two Sources of ADR Services? If So, How Much?*

Some court ADR "programs" consist of little or no more than requiring or permitting parties, in some circumstances, to hire private mediators and to pay them at market rates to host a mediation in their case.⁵⁸ Far from serving as a source of competition, such programs are a source of well-paying work for private mediators. Courts with these kinds of programs "grow" the

⁵⁸ Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 748–49 (1999); Welsh, *supra* note 15, at 139.

private market—and only the private market. Such programs might intrude upon or distort the operation of the private market if parties were permitted to select a mediator only from a court-approved list. But unless the list is exclusive or difficult to join, the effect of this kind of court program on the private market is likely to be limited.⁵⁹

While a court program that merely sends litigants into the private sector to secure mediation services is more likely to benefit than to harm the private provider community, it is not clear that such a program, if established by a federal district court, would comply with the mandates of the ADR Act of 1998.⁶⁰ Through this legislation Congress imposes a duty on each federal district court to “devise and implement its own alternative dispute resolution program . . . to encourage and promote the use of alternative dispute resolution in its district.”⁶¹ Further, Congress requires each federal trial court to “provide litigants in all civil cases [except in categories of cases exempted by local rule] with at least one alternative dispute resolution process.”⁶² The statute also requires each district to “establish . . . the amount of compensation, if any, that each arbitrator [or neutral] shall receive”⁶³ and to “designate an employee, or a judicial officer, who is knowledgeable in alternative dispute resolution practices and processes to implement, administer, oversee, and evaluate the court’s alternative dispute resolution program.”⁶⁴

As provisions such as these indicate, Congress intends federal trial courts to actively manage the ADR programs they establish and to assume real responsibility for the nature and quality of the services their programs deliver.⁶⁵ A program that consists of nothing more than sending litigants into

⁵⁹ As is obvious from other sections of this essay, I do not endorse court programs that compel parties to go to mediation and then require them to hire private mediators and to pay them at full market rates. Among other things, what is the justification for interposing an expensive barrier between litigants and their day in court? For whose use would we be protecting the court, as a public resource, through such a policy? For wealthy litigants who can both afford to pay for private mediation and to bear the expense of going to trial?

⁶⁰ 28 U.S.C. § 651 (2000).

⁶¹ *Id.* § 651(b).

⁶² *Id.* § 652(a).

⁶³ *Id.* § 657(a).

⁶⁴ *Id.* § 651(d).

⁶⁵ *Id.* § 653(a)–(b) (stating that in addition to mandating that every person who serves in such programs “be qualified and trained to serve as a neutral in the appropriate alternative dispute resolution process,” the Act requires each district court to “promulgate its own procedures and criteria for the selection of neutrals on its panels” and to “issue rules . . . relating to the disqualification of neutrals”).

the private sector to find a mediator (even if from an approved list) clearly would not be consistent with Congress' intentions.

For purposes of the issues we are addressing here, however, it is most significant that the Act permits district courts to use "professional neutrals from the private sector"⁶⁶ as the mediators in their programs—so the statute itself sets up no tension between programs that meet its requirements and the private ADR provider community.

But what about court programs that provide the services of neutrals for free or at rates well below market? Do they pose a serious competitive threat to the private sector? It would be a mistake simply to assume that the answer to this question is yes. In fact, policymakers should ask whether the question is appropriately framed before they begin trying to answer it. The appropriate question may not simply be whether a court program is meeting some portion of a need that might be met privately. To refine the inquiry, we should focus both on the full range of the need and on the quality of the services to be provided. Would the private market adequately meet the needs of poor litigants and small cases? Would the providers from the private market that met such needs deliver high quality service, or would high quality service be limited, for the most part, to the high-priced end of the market?

With these issues in mind, policymakers might frame the question as follows: Without the court program, would the private provider market meet, with a fully acceptable level of service quality, all of the need for good ADR service that would be perceived in a market fully informed about the potential value of using ADR methods? In answering this question, policymakers should not permit their vision to be distorted or limited by people who want to make their living in this field,⁶⁷ but who would not perform as neutrals at a high quality level. The net social cost of bad ADR work could be considerable.

We return to the question which began this section: How much competition is there between the private sector and court programs that provide ADR services for free or at below cost? For reasons noted below, the answer will be more difficult to find than we might assume and will not be the same in all places.

⁶⁶ *Id.* § 653(b).

⁶⁷ The fact that so many lawyers apparently would like to make their full living by serving as mediators can be understood as something of an indictment of traditional litigation and of the life of the traditional litigator. But it is not clear that we should respond to any such implicit indictments by pulling ADR service out of courts and, thereby, making our courts less useful and relevant. Instead, we might respond to this fairly widespread desire to flee the field of civil litigation by trying to improve civil litigation.

In some locales, the supply side of the private provider market may be underdeveloped or the demand may, at least temporarily, so outstrip local supplies that the court program deprives few, if any, private neutrals of paying work. But even in jurisdictions with a hefty supply of private ADR providers we should not simply assume that the net effect of court ADR programs is to reduce demand for service from the private sector. At least in some jurisdictions, the net effect of court programs that provide free or low cost service might well be to increase demand in the private sector.

As noted earlier, court ADR programs can spread familiarity with ADR and can "legitimize" new or unfamiliar processes in the eyes of both clients and lawyers. The extent of this effect will vary from court to court, but is likely to be substantial in courts that take aggressive steps to assure quality service by their neutrals and that impose a presumptive requirement that all mainstream civil cases⁶⁸ participate in some form of ADR. By increasing exposure to and acceptance of ADR procedures in the client and lawyer communities, court programs can fuel demand in the private market.

Court programs also can "legitimize" individual neutrals that want to expand their private ADR practices. Clients and their counsel may have greater confidence in, and be more likely to hire, a private provider who has completed a court's training program and has been accepted into a court's panel of qualified neutrals. This market credibility may be further enhanced through visible service in a court's program. At least in some settings, lawyers and clients might well assume that a neutral that serves with some frequency in a court's program enjoys the confidence and respect of the local judges. It would not be surprising if that kind of oblique imprimatur from the court worked to attract more business.

The extent of the intrusion into the private market by a court's ADR program also can be reduced by local rules that permit neutrals to charge market rates for their services, if the parties agree, after the neutral has served for the first few hours for free or at below market rates. In addition, court rules could permit parties with sufficient resources and sophistication to agree to pay a neutral selected through the court's program at market rates from the outset, if, for example, the parties want the neutral to commit more time to preparation and more hours to the ADR sessions than normally would be expected in the court's program. These kinds of arrangements are not

⁶⁸ I use the word "mainstream" in this setting not to suggest any value judgment, but simply to signal that some courts have concluded that some categories of civil cases should not be presumptively required to participate in an ADR process. In the Northern District of California, for example, the court exempts from automatic assignment to its ADR program (1) appeals from decisions by the Social Security Administration, (2) certain cases in which the government is trying to collect a debt, and (3) prisoner petitions, among others.

uncommon in the San Francisco Bay Area, where they are permitted by the federal district court's rules.⁶⁹ The court's rules requiring parties and counsel in all mainstream civil cases to take a hard and thoughtful look at the possible benefits of an ADR process may well increase the percentage of cases that end up using an ADR process for which a neutral receives compensation.⁷⁰

B. To the Extent That There is Some "Competition" Between Court Programs and Private Providers of ADR Services, How Can We "Manage" That Competition?

Conceding that I am not sure who "we" are in this question, I am inclined to suggest that rather than thinking in terms of managing competition we should think in terms of "enhancing" our "relationship." While managing seems a bit beyond our reach, it is important to ask what steps we might take to maximize the benefits that flow in both directions from healthy development of ADR in the private and in the public sectors.

We should begin by acknowledging that "competition" in some forms and under some circumstances can be healthy for both the private providers and the court programs. Competition can inspire private providers to deliver high quality service and to develop especially effective techniques in order to remain attractive as an alternative to publicly provided services. Simultaneously, competition can inspire court programs to learn from innovations in the private sector and to strive to deliver neutral services that are comparable in quality to the services that are available privately.

We also should keep clearly in mind how much we can learn from one another. To maximize the benefits and minimize the costs of whatever competition exists between the private and the public providers, we must work hard to keep the lines of communication wide open so that each sector understands the other—what is developing and being learned, as well as the concerns that arise and the problems that are being encountered. In part because they are supported by and should strive to offer something of value

⁶⁹ See, e.g., N.D. CAL. ADR R. 6-3(b) (2003).

⁷⁰ During the "court-year" that ended September 30, 2004, the judges of the United States District Court for the Northern District of California formally "referred" 981 civil cases to mediation, early neutral evaluation, or a private ADR process selected by the parties. Even though the services of the mediator or the evaluator in the court's programs were free, the parties chose to turn to the private provider community and pay market rates for the services of a neutral in 23% of these 981 cases. During the same reporting period an additional 358 cases were "referred" to a (presumptively early) settlement conference hosted by a magistrate judge. These statistics are maintained internally by the administrators of the ADR program in the Northern District.

to all taxpayers, court programs have a duty to share what they are doing and learning with the private sector and to listen with an open mind to the viewpoints and concerns of private ADR providers. Court policymakers must not only reach out with information; they also must actively seek input and counsel from all quarters. They must then try to be as responsive as possible, remaining open to making changes in or adjustments to programs and protocols.

There are a number of steps courts could take, or policies they could adopt, that would help enhance the relationship between their ADR programs and the private provider community. For example, courts can offer valuable training and certification to private providers for free or at below market prices—perhaps in return for commitments to serve pro bono in a few of the court's cases per year. Courts also can sponsor educational programs that are open to everyone who is interested, such as lectures and dialogues on developments in pertinent areas of the law like confidentiality or ethics, or on techniques for responding to difficult recurring problems that arise in mediation. In addition, courts can sponsor issue specific seminars or periodic meetings of working groups of neutrals who serve in defined categories of cases (e.g., employment, civil rights, or intellectual property), or who share interests in certain aspects of their work.⁷¹

In all of these educational undertakings, courts should actively solicit participation, as faculty and as students, from the private ADR provider community. Court-sponsored ADR trainings provide private practitioners with opportunities not only to improve their skills but also to “network” with and to demonstrate their abilities to other members of the community. Serving on the faculty at a court-sponsored training session, for example, can be an excellent way to enhance private mediators’ visibility and to increase their referrals. Such arrangements also benefit the courts. By institutionalizing participation by private providers, courts improve the likelihood that their trainings and process protocols incorporate the most recent and sophisticated learning that is occurring in other ADR spheres. Toward that same end, Courts also should send their ADR staff, on a regular schedule, to educational programs that are sponsored or taught by highly regarded private providers.

Courts could consider taking a number of additional measures to reduce any negative impact their ADR programs might have on the market for private providers. As the United States District Court for the Northern

⁷¹ See, e.g., Howard Herman & Jeannette Twomey, *Big Training in Small Packages* (forthcoming in *Dispute Resolution Magazine*, published quarterly by the Section of Dispute Resolution of the American Bar Association) (describing the use of “advanced ADR practice groups” and “peer consultation groups” in northern California and in Virginia).

District of California has done, the court can limit the number of hours that it asks its neutrals to provide without compensation or at court-set rates that are below market.⁷² Program rules also could cap the hourly rates charged by neutrals for only a limited number of hours, permitting panelists to charge market rates if the parties want to continue with the process for a longer period. Toward the same end—reducing the impact on the private provider market—courts could decline to provide free ADR services in cases where all parties clearly could afford to pay private rates, or more radically, courts could limit free ADR service to specified categories of cases, such as civil rights or employment cases, or cases in which a party is proceeding *in forma pauperis* or could otherwise demonstrate real financial hardship.⁷³

Another way courts could reduce the penetration of their ADR programs into the private market would be to shift to provision of free ADR services only by paid court staff, such as mediators employed by the court. While there are policy pluses and policy minuses of courts relying on staff neutrals,⁷⁴ one effect of such an approach would be to limit the number of cases that a court's program could serve for no fee. It is a virtual certainty that public funding for staff neutral positions will remain very limited. That reality means a program that uses only court staff in the role of the neutral can serve only a small percentage of the civil docket of a court of general jurisdiction—leaving the remainder to be served by private providers.⁷⁵ Moreover, courts that provide free ADR service only through staff neutrals may well be inclined to commit use of that limited resource only to parties who could not afford to hire a private neutral.

⁷² N.D. CAL. ADR R. 6-3(b) (2003). Under this provision, mediators who serve in the Northern District's program are expected to donate the time it takes to prepare for the mediation and the first four hours that they devote to the mediation session. If the parties want them to continue, they can charge \$200 per hour (below market in the San Francisco area). After eight hours, the mediators can charge their full normal rates if the parties agree to continue the process on those terms.

⁷³ As discussed earlier in this essay, neither of these courses should be followed without first giving careful consideration to the negative policy implications each could have. See *infra* Part V.

⁷⁴ See Brazil, *supra* note 58, at 750–811.

⁷⁵ Because I believe that a wide range of civil case types can benefit from ADR, I do not endorse program design decisions that would enable a court program to serve only a small percentage of the cases on its civil docket.

VIII. PERIODICALLY, COURTS SHOULD RE-EXAMINE THEIR ADR PROGRAMS TO DETERMINE WHETHER THEY SHOULD SURVIVE AND, IF SO, IN WHAT FORM.

Independent of any specific step taken or policy adopted for the purpose of enhancing the relationship between its ADR program and the private ADR provider community, each court should periodically and very visibly reassess the nature and reach of its program. In undertaking such a reassessment, each individual court should address for itself the larger questions that have shaped this essay.⁷⁶ With an open mind, and with an eye on the specific circumstances in which it serves, each court should publicly re-examine the purposes and goals of its program. With data and views systematically gathered from litigants, lawyers, neutrals, and private providers, courts should assess whether or to what extent the purposes of their ADR program are being achieved. They should try to determine how, and how well, parties are using their ADR services—and whether changes are called for in procedures, rules, program design, or process protocols. In conducting such re-examinations, courts should remain sensitive to the possibility that routinization of mandated mediation might tend to convert it into something of a hollow ritual, or might reduce the parties' motivation to try to settle their cases early and on their own—well before a court scheduled ADR session would occur.

As part of this process, courts should try to ascertain what impact their program is having on the private provider community and on the character of parties' expectations about and uses of ADR services in the private sector. For example, courts should ask whether their program is changing what parties think mediation is, or what parties want mediation to be. In addition, courts should try to determine whether there have been any significant changes in the private provider market or in the character or extent of the demand from litigants for ADR services.

The kind of open-minded, objective, and dialectically enriched re-examination of programs that I envision here could improve the vitality and utility of ADR in both the public and private sectors. Moreover, it is through this kind of thoughtful re-examination of the services they sponsor that individual courts can provide the kind of information and insight that the policymaking process needs in order to determine wisely whether or in what form court ADR programs should survive.

⁷⁶ Congress requires each federal district court to establish some kind of ADR program—but has given individual courts considerable flexibility in fixing the content of their programs. 28 U.S.C. §§ 651, 652, 658.

One last suggestions: if, after re-examining its program, a court concludes that it should continue to provide some free or below cost ADR services, the court should take special care to explain, very publicly, why. Such a public explanation can demonstrate to both private providers and the community at large that the court has addressed the issues with an open mind. More important, the court can use this kind of report to the community to make sure that it understands what values and purposes drive the court's decision to continue—perhaps in a modified form—its program. The people need to understand that, in the court's mind, the issue is not whether the court's mission is to serve them, but how.

